

# United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 20284

GARY CARSON LEWIS, on behalf of  
SHELLY ANN LEWIS, et al. ,

Plaintiffs and Appellants,

vs.

THE GENERAL SERVICES ADMINISTRATION  
OF THE UNITED STATES OF AMERICA,  
et al. ,

Defendants and Appellees.

On Appeal From the United States District Court  
For the Southern District of California  
Southern Division

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APPELLANTS' OPENING BRIEF

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FILED

SEP 24 1965

FRANK H. SCHMID, CLERK



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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of California. The District Court had jurisdiction of the cause by virtue of 25 U.S.C. 345.

The plaintiffs in the action are Indians entitled to allotment under the General Allotment Act, Section 4, Act of February 8, 1887, 25 U.S.C. 334, as amended. The complaint was filed to obtain a declaration of their rights to selection, entry, settlement, and allotment on and to certain unimproved real property on the former United States Naval Reservation known as Camp George F. Elliott, which property was described in the complaint. (R 12-25). Plaintiffs also sought an injunction prohibiting defendants from disposing of said real property pending

the administrative and judicial determination of plaintiffs' rights relating to said property (R 2, 9).

Dismissal of the complaint was entered April 19, 1965 (R 70). Plaintiffs filed their notice of appeal from said judgment on June 17, 1965. (R 73).

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal by virtue of 25 U.S.C. 345 and 28 U.S.C. 1291.

### STATEMENT OF FACTS

The property involved in this litigation consists of unimproved portions of the former United States Naval Reservation known as Camp George F. Elliott. A portion of Camp Elliott, not involved in this litigation, is still activated. The major part of Camp Elliott was condemned by the United States for purposes of establishing a naval reservation in Civil Case Nos. 105 and 162, San Diego. The Navy held the property until on or about September 14, 1960, at which time they reported a large part of it to the General Services Administration as excess to the needs of the Department of the Navy. General Services Administration promptly followed their standard screening process for determining the existence of any federal need for the property by circulating the availability of the property by notice to Federal agencies. The result of the screening was a showing that the property was not needed or desired for any federal purpose, and the property was determined surplus September 22, 1961.

Plaintiffs filed for Indian allotment on unimproved portions of this land under the General Allotment Act of 1887, sec. 4, in the appropriate land office of the Bureau of Land Management. (R 5). Final decision on said filings has not been

rendered by the Secretary of the Interior.

Plaintiffs notified General Services Administration of the filings and requested that General Services Administration transfer the property to the Department of the Interior to facilitate processing of the applications.

Disregarding the fact that their exercise of jurisdiction over the unreserved portion of Camp Elliott had been brought in issue by applications for Indian allotment, General Services Administration offered a portion of the property to public sale with the bid opening scheduled for March 3, 1965. Plaintiffs filed suit in the District Court seeking an injunction preventing the disposal of the land on which they had filed, pending the administrative and judicial determination of plaintiffs' rights relating to said land. (R 2).

Defendants moved to dismiss the complaint. (R 40). Plaintiffs opposed defendants' motion to dismiss. (R 52). The District Court heard arguments on March 11, 1965, received briefs and took the matter under submission. (Reporter's Transcript of Proceedings Pgs. 1 - 5 Inclusive). Plaintiffs filed a Supplemental Brief on March 26, 1965 (R 53).

Judgment of the District Court was entered April 19, 1965, granting Defendants' motion to dismiss the complaint. (R 70). The judgment was based on the memorandum of decision of the Court concluding that 40 U.S.C. 472(d) does not pertain to lands reacquired by the government on the basis that there is a distinction between public land and acquired land. (R 61).

This appeal followed. (R 73).

SPECIFICATION OF ERRORS

1. The District Court erred in granting Defendants' motion to dismiss.
2. The District Court erred in dismissing Plaintiffs' complaint with prejudice.
3. The District Court erred in concluding that Title 40, U.S.C. 472(d) does not pertain to lands acquired or reacquired by the government.
4. The District Court erred in failing to restrain or enjoin the Defendants from selling the real property selected by Plaintiffs for allotment under 25 U.S.C. 334, as amended.
5. The District Court erred in failing to issue a declaratory judgment declaring that Plaintiffs are entitled to enter the land selected for allotment under 25 U.S.C. 334, as amended.
6. The judgment of the District Court was in violation of the Fifth Amendment to the United States Constitution by establishing an arbitrary classification of land without regard to the use or character of said land, thus depriving Plaintiffs of the right to select allotment on the land of their choice.

QUESTION PRESENTED

IS THE LAND WHICH PLAINTIFFS SELECTED AS THEIR CHOICE  
FOR INDIAN ALLOTMENT UNAVAILABLE TO THEM SIMPLY BECAUSE IT  
CAME INTO GOVERNMENT OWNERSHIP BY PURCHASE (CONDEMNATION)?

## SUMMARY OF ARGUMENT

This litigation involves the rights of Indians seeking allotment under Section 4 of the General Allotment Act of 1887 to have their applications for allotment to certain property processed by the Department of the Interior without interference by General Services Administration.

The land in question came into Federal ownership by the process of condemnation. It was held by the Department of the Navy as part of a Naval Reservation and later declared excess to the needs of the Navy, and surplus to the needs of the Government. This is land which came into the public domain by virtue of its acquisition and instantly was segregated, i. e. , reserved from the operation of the public domain laws by virtue of its being put to the special governmental use as a Naval Reservation. Upon declaration that the land was surplus to the needs of the Government, it became unimproved, unappropriated, federally-owned real property suitable for return to the public domain in an unreserved status.

By virtue of 40 U.S.C. 472(d) this land became available for allotment to Plaintiffs.

## ARGUMENT

THE MANNER IN WHICH UNIMPROVED REAL PROPERTY COMES INTO FEDERAL OWNERSHIP IS IRRELEVANT AFTER THE LAND BECOMES SURPLUS TO THE NEEDS OF THE GOVERNMENT AND IS THEREFORE UNAPPROPRIATED.

Plaintiffs seek only to obtain their Indian allotment on the land which they have selected. There is no question as to whether this unimproved, unappropriated

federally-owned property is physically suitable for selection by Plaintiffs. But Defendants would sell this land to the highest bidder and deprive Plaintiffs of their allotment.

The statute authorizing allotments to Plaintiffs is Section 4 of the General Allotment Act (Act of February 8, 1887, 24 Stat. 388, 389), which in pertinent part states:

"where any Indian not residing upon a reservation. . . shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children. . ."

Defendants would deny allotment on this land to Plaintiffs because it is what they call acquired land - land acquired or reacquired by the United States by purchase, condemnation, etc., and held for a specific public purpose. This property was acquired by condemnation. The property the United States obtained in the purchase of the Territory of Alaska, to which the general land laws relating to disposition of land applies, was purchased. Much property purchased to form or add to various Indian reservations was purchased, and portions of the General Allotment Act apply to that land. The latter is subject to allotment to Indians on those reservations by virtue of the Act of February 14, 1923 (42 Stat. 1246).

The availability of this land for allotment is a birthright which Defendants would deprive Plaintiffs of by misguided disuse of the provisions of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 484 (63 Stat. 385)

and 40 U.S.C. 472(d) (72 Stat. 29). Defendants assert that Section 484 gives the General Services Administration, hereinafter referred to as "GSA," the right to dispose of all acquired land regardless of its nature and character at the time they would dispose of it. Plaintiffs believe that Section 472(d) excepts this property from the definition of the term property as used in said Act.

Section 472(d) is the result of successive amendments enacted in 1952 (66 Stat. 593) and 1958 (72 Stat. 29).

The pertinent wording before the 1952 amendment was:

"(d) the term 'property' means any interest in property of any kind except (1) the public domain and lands reserved or dedicated for national forest or national park purposes;"

The 1952 amendment inserted after "domain" the following:

"including lands withdrawn or reserved from the public domain which the Administrator, with the concurrence of the Secretary of the Interior, determines are suitable for return to the public domain for disposition under the general public land laws because such lands are not substantially changed in character by improvements. "

Upon enactment of the 1958 amendment, at the time of Plaintiffs filing for allotment on the land and presently, said section read:

"The term 'property' means any interest in property except (1) the public domain; lands reserved or dedicated for national forest or national park purposes; minerals in lands or portions of lands withdrawn or reserved from the public

domain which the Secretary of the Interior determines are suitable for disposition under the public land mining and mineral leasing laws; and lands withdrawn or reserved from the public domain except lands or portions of lands so withdrawn or reserved which the Secretary of the Interior, with the concurrence of the Administrator, determines are not suitable for return to the public domain for disposition under the general public-land laws because such lands are substantially changed in character by improvements or otherwise; . . . "

There was no comment on the meaning of the change or of the section of the amending bill in the 1952 report to Congress (Vol. 2, 1952, U.S. Code Congressional and Administrative News, 2121). But, there was substantial comment on what Congress intended for the language to mean as Section 472(d) read after the 1958 amendment; by what was meant by the terms public domain, public lands, reserved, withdrawn, acquired, and reacquired from 1958 on (Vol. 2, 1958, U.S. Code Congressional and Administrative News, 2223, at pg. 2227).

The amended Section 472(d) had incorporated the 1952 and 1958 amendments. The class of property taken out of GSA's control was expanded in 1952 and again in 1958. The procedure to be followed to insure that these properties not be administered by GSA was changed in 1958.

Congress, in making needful rules and regulations respecting the Territory belonging to the United States, declared that the terms "public lands" and "public domain" are interchangeable; declared that those terms encompass acquired

lands reservations, i. e., reservations composed of acquired lands held for a specific public purpose, such as a military reservation, that these too are reservations from the public domain.

What did Congress say they meant by "lands withdrawn or reserved from the public domain"? What is "public domain"? What are "public lands"? What is "reserved or reservation"?

"Public lands" or "public domain lands" are purely and simply Federally-owned lands. This is the meaning used by Congress in the reported bill. Congress did not limit the meaning of "public domain lands" merely to "original public domain", though they had the opportunity to do so.

"In their general sense the terms "public lands" and "public domain lands" are defined as:

"Original public domain lands which have never left Federal ownership; also, lands in Federal ownership which were obtained by the Government in exchange for public lands or for timber on such lands; also, original public domain lands which have reverted to Federal ownership through operation of the public-land laws (source: Department of the Interior, Bureau of Land Management, Glossary of Public-Land Terms (1949)).

"In its technical, legal, or statutory sense, however, the term 'public lands' by itself---employed interchangeably with the term 'public domain lands'---is today used

to embrace vacant, unappropriated, unreserved Federal real property; i. e. , lands open to the public land laws relating to settlement, entry, location, and sale, and authorizing entry for mining, mineral leasing, timber and other materials removal, local public purposes, recreation, homesteading, etc. Such lands are administered by the Bureau of Land Management, Department of the Interior.

" 'Public lands' as a term by itself should also be distinguished from the term 'reserved public lands' or 'withdrawn public lands.' All are public lands, all are public domain; the former generally refers to unreserved public lands, while the latter two terms refer to areas described as 'Federal reservations.' :

"The term 'withdraw' is used interchangeably with the term 'reserve' to describe the statutory or administrative action which restricts or segregates a designated area of Federal real property from the full operation of the public-land laws relating to settlement, entry, location, and sales, which action holds them for a specific---and usually limited ---public purpose.

"Examples of reservations include: national forest reserve lands; national parks, monuments, and other units of the national park system; fish and wildlife refuges; petroleum, oil shale, coal, and other mineral reserves;

recreation and wilderness areas; reclamation and power withdrawals or reservations; military reservations, and similar areas, all of which are held by some Federal agency for specified public purposes, and all of which may be created wholly from reserved original public-domain lands, wholly from acquired or reacquired lands, or from portions of both. Other examples of Federal reservations, frequently created wholly from acquired lands, are post-office sites, weather stations, immigration and customs facilities, lighthouses, Federal Court-house sites, and the like.

"Federally owned lands, as distinguished from reserved public lands on Federal reservations, then, are commonly referred to today---as they are in the reported bill and this report---as 'public lands' or 'public domain lands.'"

The above quotations are found at pages 262, 263, 265 and 266 of the Report from the Committee on Interior and Insular Affairs of H.R. to accompany H.R. 5538; 85th Congress, 1st Session, H.R. #215, March 21, 1957.

All federally owned land is public land which is either appropriated or unappropriated. Once it becomes appropriated to a governmental use it is withdrawn or reserved from the public domain. At such time as it becomes unappropriated, as did the land in question when it was declared surplus by GSA in 1961, it is by definition returned to the public domain. It becomes unappropriated public land. It becomes federally owned land not otherwise appropriated. Such was the

status of the parcels of land selected by Plaintiffs at the time they filed their appropriate papers in the Riverside District Land Office of the Bureau of Land Management.

The basic assumption of Defendants' position is that when the United States acquires land by purchase or condemnation, said land never has any relation to the public land laws. Such a position ignores the words of the Report to Congress referred to above. The fact that the land is acquired for a special governmental purpose and is therefore instantly reserved from the public domain confuses the Defendants. Simply stated, the condemnation of this land by the United States operated both to acquire the land in the name of the United States and, because the land was acquired for a special governmental purpose, to reserve the land from the operation of the public land laws relating to settlement or entry.

Defendants feel that since some acquired lands are unavailable for settlement under the General Allotment Act (while reserved to a special governmental use) no acquired lands are available.

OKLAHOMA vs. TEXAS, 258 U.S. 574 (1922) stands for the principle that acquired or reacquired lands do not come under the operation of the public land laws by the mere force of the reacquisition. But, this is not relevant where we are concerned with acquired land after it is no longer held for a special governmental purpose. The reasoning of the cases is that the operation of the public land laws while the property was reserved would interfere with the purpose and administration of the land while reserved. The essential difference is that this land was surplus, unappropriated, and unreserved at the time of selection by Plaintiffs.

SAM D. RAWSON vs. U.S., 225 F 2d 855 (1955) involved an application

on land held for a reclamation project at the time of the filing. The land was not subject to entry because it was being held for the governmental purpose for which the lands were acquired.

In light of the 1958 amendment it would be inconsistent to carry the ruling of those cases to the situation where an application has been made for Indian allotment on land after it has been shown to be outside of the needs of any federal agency, as was done in the instant case.

The same principle is expressed in THOMPSON vs. U.S., 309 F 2d 628 (1962). That case involved an application filed in 1954 under the leasing laws. The application was on land acquired and held under a specific governmental purpose. The court said that the recognition of a mining location pursuant to 30 U.S.C. 22 would be wholly inconsistent with the purpose of the acquisition of the land. The land was held for the purpose of preserving the timber on the land at the time of filing the mining claim.

The El Mirador Hotel case, 60 L.D. 299 (1949) involved a Gerard Scrip application filed in 1947. The decision was that acquired land is not immediately open for entry, etc., upon acquisition by the United States for a specific governmental purpose. The term "public lands" generally does not include lands acquired by the United States for private ownership. This case does not apply where, at the time of application, the lands are no longer "reserved."

It is interesting to note that in J. D. MELL, et al., 50 L.D. 308 (1924) public lands withdrawn and acquired were treated the same as regards leases for grazing and agricultural purposes, but that there was a distinction for leasing purposes on the theory that successful prospecting would allow leases with rights of

renewal which would indefinitely withhold the land from use in the reclamation project for which the land was acquired. The decision stated, at page 313, that "in the case of private lands acquired by purchase or condemnation, said lands are from the outset definitely segregated from the public domain." The proceeds from the land would by the provisions of the leasing act, be applied in a manner inconsistent with the declared policy of Congress with respect to acquisition of such lands, namely, that all proceeds from the lands so purchased should be covered into the reclamation fund, as per the Act of 1902. Of major importance is the fact that land conveyed by the state was treated in a similar manner to original public domain which had been withdrawn for purposes of establishing the reclamation project.

Mr. Justice Holmes observed that "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis." HYDE vs. UNITED STATES, 225 U.S. 347, 384, 391 (1912).

The late Judge Frank said in UNITED SHIPYARDS vs. HOEY, 131 F.2d 525, 526-527 (C.A.2) (1942): "... some of the greatest errors in thinking have arisen from the mechanical, unreflective, application of old formulations--forgetful of a tacit 'as if'--to new situations which are sufficiently discrepant from the old so that the emphasis on the likenesses is misleading and the neglect of the difference leads to unfortunate or foolish consequences. In governmental or business administration, such neglect, when it occurs, provokes justifiable irritation at 'bureaucracy;...'"

Such is the nature of Defendants' insistence that the term "acquired

land," when applied to the land involved in this litigation, must of itself lead to a denial of allotment of the land to Plaintiffs.

There is no overriding public policy requiring that land fitting within the definition of acquired land be disposed of by GSA. Acquired land is presently available to Indians on reservations containing acquired land (42 Stat. 1246). In fact, the only reason GSA is given jurisdiction of even improved real property is because the Department of the Interior traditionally deals with unimproved land and is not equipped to handle improved real estate.

Article IV, Section 3, Clause 2, of the United States Constitution says:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States;"

This provision of the Constitution clearly gives Congress this power to take the land out of the jurisdiction of GSA as they have done by virtue of the 1958 amendment to Section 472(d) of the Surplus Property Act and to make this land available to Plaintiffs under Section 4 of the General Allotment Act.

The fact that unappropriated, unimproved real property should be administered by the Department of the Interior is further reflected by the following excerpt from page 6 of the Federal Property and Administrative Services Act of 1949, as amended. GSA, Floete. (Prepared April 1, 1956 by office of General Counsel GSA)

"1952 amendment thus means that lands previously withdrawn or reserved from the public domain for other governmental use shall also be treated as public domain and not as property

under the Act when the Administrator, with the concurrence of the Secretary of the Interior, determines that they are suitable for return to the public domain for disposition under the general public land laws because such lands are not subject to the Act in the absence of such a determination.

Excess lands, originally withdrawn or reserved from the public domain, which are unimproved or contain only minor improvements, can more effectively be disposed of under the public land laws which operate with respect to the balance of the public domain lands. Lands which have been so extensively improved as substantially to change their character can be better disposed of under the act. " (emphasis ours)

On the basis of the foregoing argument, Plaintiffs respectfully request that the Final Judgment and Decree in this cause be reversed and that this Honorable Court issue an order enjoining General Services Administration from continuing with their threatened sales of land selected by Plaintiffs for allotment.

Respectfully submitted,

DONALD JAY SOLOMON

Attorney for Plaintiffs (Appellants)

## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: September 22, 1965

DONALD JAY SOLOMON

Attorney for Plaintiffs (Appellants)

